

JUL 25 1942

CHARLES ELMOORE CROPLEY
CLERK

37

In the

Supreme Court of the United States.

OCTOBER TERM, 1942.

No. 131.

SCOTT F. KITTREDGE, Petitioner,

v.

**FRANK H. STEVENS, AMERICAN SURETY COMPANY
OF NEW YORK, ALBERT R. MacKUSICK, FIDELITY &
DEPOSIT COMPANY OF MARYLAND, LOUIS L. GREEN,
GLOBE INDEMNITY COMPANY, and AETNA CASUALTY
& SURETY COMPANY, Respondents.**

BRIEF FOR THE RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI

EDWIN A. HOWES,

Attorney for:

**AMERICAN SURETY COMPANY OF NEW YORK,
FIDELITY & DEPOSIT COMPANY OF MARYLAND,
GLOBE INDEMNITY COMPANY,
AETNA CASUALTY & SURETY COMPANY,
LOUIS L. GREEN.**

FRANK H. STEVENS, pro se.

ALBERT R. MACKUSICK, pro se.

Of Counsel:

**PHILIP R. WHITE, Attorney for
AMERICAN SURETY COMPANY OF NEW YORK.**

**ALBERT E. CAREY, Attorney for
FIDELITY & DEPOSIT COMPANY OF MARYLAND.**

**HUBERT C. THOMPSON, Attorney for
— GLOBE INDEMNITY COMPANY, and
LOUIS L. GREEN.**

**ASA S. ALLEN, Attorney for
AETNA CASUALTY & SURETY COMPANY.**

INDEX.

SUBJECT INDEX.

	Page
Reference to Opinions Below	1
Question Presented	1
Statement of Facts	1
Argument	3

TABLE OF CASES CITED.

Commonwealth Trust Co. v. Bradford, 297 U.S. 613 .	3
Princess Lida v. Thompson, 305 U.S. 456 . . .	3
Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33	3

**In the
Supreme Court of the United States.**

OCTOBER TERM, 1942.

No. 131.

**SCOTT F. KITTREDGE,
PETITIONER,**

v.

**FRANK H. STEVENS, ET ALS.,
RESPONDENTS.**

**BRIEF FOR THE RESPONDENTS
ON PETITION FOR CERTIORARI.**

I. REFERENCE TO OPINIONS BELOW.

The opinion of the Circuit Court of Appeals for the First Circuit (R. 51) was reported in 126 F. (2d) 263, and the decision of the United States District Court for the District of Massachusetts (R. 32) was reported in 37 F. Supp. 488.

2. QUESTION PRESENTED.

The basic question presented is whether certiorari should be granted to determine whether the United States District Court was right in declining to take jurisdiction of a complaint, brought by a citizen of Maine against fiduciaries appointed by probate courts of Massachusetts, seeking an accounting and other relief incidental thereto with respect to disposal of assets which came into their possession in their fiduciary capacities.

3. STATEMENT OF FACTS.

The original plaintiff, Marie L. Ellis, a resident of Maine, now deceased, based her right to maintain the action upon the fact that she was one of the heirs at law and next of kin of a Sarah C. Shapley, a resident of Massachusetts, who died intestate in 1932 (R. 2). Relief was sought against

the respondent Stevens with respect to his disposal as administrator *de bonis non* with the will annexed of assets of the estate of George H. Shapley, who died in 1909 a resident of Massachusetts (R. 2). Stevens was appointed by the Probate Court for Middlesex County after the death of George H. Shapley's executor, who died before the estate had been fully administered (R. 2, 14). Sarah C. Shapley, the widow of said George H. Shapley, having waived the provisions of his will, became entitled to ten thousand dollars (\$10,000) out of the estate and a life interest in the excess, above that amount, of the share to which she would have been entitled had the testator died intestate (R. 16-17). The respondent MacKusick was appointed statutory trustee by the same probate court to take over from Stevens and hold in trust for the widow that portion of the estate in which the widow had a statutory life interest (R. 17). The respondent Green was appointed by the same probate court temporary guardian of Mrs. Shapley, also administrator of her estate, and, by the Probate Court of Norfolk County, as administrator *de bonis non* of the estate of Abram Bromade, who was Mrs. Shapley's grandfather (R. 22-27). Sureties upon the probate bonds, in statutory form, of these three fiduciaries were joined as parties defendant (R. 2). All respondents filed motions to dismiss for lack of jurisdiction over the subject matter (R. 10, 32). In support of these motions affidavits supported by duly authenticated copies of probate records were filed by several defendants (R. 14-31), from which it appears that each of the several fiduciaries filed accounts in the probate court which appointed him, including final accounts, showing proper disposition of all the assets which came into his hands in his fiduciary capacity and final distribution. All of said accounts of the individual respondents and also of the deceased executor of the will of George H. Shapley were allowed by decrees after notice to all parties interested and after hearings (R. 14-31, Opinion, R. 36, 38, 39, 40).

4. ARGUMENT.

Nowhere in this complaint for an accounting is there an allegation that the basis of the suit was discovered subsequent to the final accounts of the various fiduciaries. The statement of the petitioner (Pet. Brief p. 6) that this was alleged is erroneous. There is no allegation that the claims put forth by Marie L. Ellis in the complaint were not fully considered and passed upon in the probate accounting of the successive fiduciaries or that the rights and interests of Sarah C. Shapley and those interested in her estate were not properly safe-guarded. No amendment to the complaint was filed or offered in the proceedings below.

Recent decisions of the Supreme Court of the United States cited and relied upon by the courts below have made clear that diversity of citizenship does not confer upon Federal courts jurisdiction of accountings of fiduciaries appointed by a probate court having exclusive jurisdiction of the disposal of the property to be accounted for.

Waterman v. Canal-Louisiana Bank & Trust Co.,
215 U.S. 33.

Princess Lida v. Thompson, 305 U.S. 456.

The case of *Commonwealth Trust Company v. Bradford*, 297 U.S. 613, which the petitioner claims is in conflict, was a suit brought by a receiver of a national bank wherein the receiver sought to establish rights in a trust created by the defunct national bank and there was no question of probate accounting involved.

A review by this court on certiorari of the action of the Circuit Court of Appeals affirming the judgment of dismissal by the District Court would not settle any real conflict between the Federal courts of different circuits. The two decisions of the Circuit Court of Appeals of the Fifth Circuit, cited on page 7 of petitioner's brief, are not in conflict with each other or with the decision of the court below. All three decisions reiterate the principle that the

Federal court does not have jurisdiction over a probate accounting by a fiduciary appointed by a state probate court.

From an examination of the opinion of the judge of the District Court (R. 32-41) who had before him the affidavits filed by the respondents supported by duly authenticated copies of their probate accounts and the probate records, all of which are part of the record which went to the Circuit Court of Appeals, it is clear that the decision of the District Court was in accordance with established Federal law in holding that the Federal court is without jurisdiction to entertain an action which involves collateral attack on decrees of a state probate court and contemplates reopening, revising and reviewing final decrees of that court upon accounts rendered by fiduciaries appointed by that court.

Respectfully submitted,

EDWIN A. HOWES,

Attorney for:

AMERICAN SURETY COMPANY OF NEW YORK,
FIDELITY & DEPOSIT COMPANY OF MARYLAND,
GLOBE INDEMNITY COMPANY,
AETNA CASUALTY & SURETY COMPANY,
LOUIS L. GREEN,

FRANK H. STEVENS, *pro se.*

ALBERT R. MACKUSICK, *pro se.*

Of Counsel:

PHILIP R. WHITE, *Attorney for*

AMERICAN SURETY COMPANY OF NEW YORK.

ALBERT B. CAREY, *Attorney for*

FIDELITY & DEPOSIT COMPANY OF MARYLAND.

HUBERT C. THOMPSON, *Attorney for*

GLOBE INDEMNITY COMPANY and

LOUIS L. GREEN.

ASA S. ALLEN, *Attorney for*

AETNA CASUALTY & SURETY COMPANY.

End